

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

|                           |   |                               |
|---------------------------|---|-------------------------------|
| HECTOR BIENVENIDO ARIAS,  | ) |                               |
| Petitioner                | ) | CIVIL ACTION NO. 05-10684-MLW |
|                           | ) |                               |
| v.                        | ) |                               |
|                           | ) |                               |
| UNITED STATES OF AMERICA, | ) |                               |
| Respondent                | ) |                               |
|                           | ) |                               |

**Government's Motion To Substitute  
Exhibits In Support Of Its Memorandum**

The United States of America, by Michael J. Sullivan, United States Attorney, and Michael J. Pelgro, Assistant U.S. Attorney, hereby files this motion to substitute exhibits in support of its memorandum in opposition to the petitioner's motion under 28 U.S.C. § 2255. The government requests that the Court consider the three exhibits attached to this motion instead of the three exhibits attached to the government's memorandum.

In support of this motion, the government states that, on December 5, 2005, it filed its memorandum in opposition to the petitioner's motion under 28 U.S.C. § 2255. The government attached to the memorandum three exhibits from the underlying criminal case. Certain exhibits, however, did not scan properly so that only the first page of the proposed exhibit was filed. The government has re-scanned the exhibits in their entirety.

The government therefore respectfully requests that the Court allow this motion to substitute the three exhibits attached to this motion instead of the three exhibits attached to the previously-filed memorandum.

Respectfully submitted,

MICHAEL J. SULLIVAN  
United States Attorney

By: /s/Michael J. Pelgro  
Michael J. Pelgro  
Assistant U.S. Attorney

DATED: December 7, 2005.

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the person listed below a copy of the foregoing document by depositing in the United States mail a copy of same in an envelope bearing sufficient postage for delivery:

Hector Bienvenido Arias  
Inmate No. 23566-038  
FCI Elkton  
P.O. Box 10  
Lisbon, OH 44432

This 7th day of December 2005.

/s/Michael J. Pelgro  
MICHAEL J. PELGRO  
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA ) CR 01-10056  
v. ) Boston, MA  
NELSON RUDY TEJEDA, ET AL ) September 10, 2002  
 )  
 )

BEFORE THE HONORABLE MARK L. WOLF  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

(As previously noted.)

JUDITH A. TWOMEY, RPR  
Official Court Reporter  
One Courthouse Way  
Courtroom 10~Room 5200  
Boston, MA 02210  
(617) 946-2577



## INDEX

| <u>WITNESS</u>        | <u>DIRECT</u> | <u>CROSS</u> | <u>RD</u> | <u>RC</u> | <u>COURT</u> |
|-----------------------|---------------|--------------|-----------|-----------|--------------|
| Joevanni Figueroa     | 94            | 107          |           |           |              |
| Linna Gonzalez        | 116           | 132          |           |           |              |
| Raphael Feliz Guevara | 134           | 139          |           |           | 139          |
| Awilda Osorio         | 140           |              |           |           |              |

| <u>EXHIBITS</u> | <u>MARKED</u> | <u>RECEIVED</u> |
|-----------------|---------------|-----------------|
| 1               |               | 113             |
| 2               |               | 132             |
| 3               |               | 138             |

1                   THE DEFENDANT: Yes, with the help of my  
2 attorney.

3                   THE COURT: Okay. And then when we were here  
4 last week, I discussed with counsel whether they could  
5 talk further to narrow any of the disputes with regard  
6 to weight, for example. There were some instances where  
7 the Probation Department had a higher weight than the  
8 government was advocating. But it appeared there might  
9 be an area in which reasonable people could reasonably  
10 differ, based on the evidence, and there were some  
11 instances where, although I may not have verbalized  
12 this, it appeared that some of the defendants were  
13 taking positions with regard to weight, particularly  
14 defendants high up in the conspiracy that there's very  
15 strong evidence to indicate would be proven to be too  
16 low.

17                   But has there been any evolution in the  
18 parties' positions?

19                   MR. PELGRO: Yes, your Honor. And, if you  
20 want, I can go through them defendant by defendant.

21                   THE COURT: Sure.

22                   MR. PELGRO: With regard to Hector B. Arias, my  
23 understanding is that the defendant is now not disputing  
24 the government's drug quantity figure of one to three  
25 kilograms of heroin, which is base offense level 32. So

1       -- and that's the position the government took in the  
2       plea agreement. So that the government continues to  
3       believe that's a reasonable estimate of this mass of  
4       evidence.

5                   THE COURT: Okay. Mr. McCall, is that correct?

6                   MR. McCALL: That's correct, your Honor.

7                   MR. PELGRO: Your Honor, the defendant is also  
8       agreeing to the four level role adjustment, which  
9       Probation has also indicated is appropriate. The  
10      government is dropping its objection concerning  
11      obstruction of justice, which Probation had declined to  
12      give. And that brings into play the acceptance issue  
13      and, obviously, the parties are agreeing to the  
14      acceptance reduction.

15                  So, essentially, your Honor, we have no further  
16      disputed factual issues with regard to Hector B. Arias.

17                  THE COURT: Mr. McCall, is that correct?

18                  MR. McCALL: That's correct, your Honor.

19                  THE COURT: In a few moments, I'm going to go  
20      over -- actually, it may make sense to do this right  
21      now.

22                  Can I see the file for Hector B. Arias.

23                  (Short pause.)

24                  THE COURT: Would Hector B. Arias please stand.

25                  Mr. McCall, have you and Hector B. Arias each

1 read -- have you read the presentence report?

2 MR. McCALL: Yes, your Honor.

3 THE COURT: Including the addenda with the  
4 objections?

5 MR. McCALL: Yes, your Honor.

6 THE COURT: Mr. Arias, was the presentence  
7 report and the objections in the back of it read to you  
8 in Spanish?

9 THE DEFENDANT: Yes.

10 THE COURT: And, Mr. McCall, other than the  
11 objections in the back of the report, did you or Mr.  
12 Arias see anything in the report that you thought was  
13 inaccurate that might make a difference to sentencing?

14 MR. McCALL: No, your Honor.

15 THE COURT: Mr. Arias, did you see anything in  
16 the report other than what your attorney originally  
17 objected to that looked like it was inaccurate and might  
18 make a difference to sentencing?

19 THE DEFENDANT: In my opinion, there are some  
20 parts that are not good.

21 THE COURT: Mr. McCall, in your opinion, there  
22 are some parts that are not correct.

23 Mr. Arias, have you discussed with your  
24 attorney what parts are not correct and told him what  
25 parts you think are not correct?

1                   THE DEFENDANT: Yes.

2                   THE COURT: Let's see on some of this.

3                   Mr. Arias or Mr. McCall, I was just told that  
4                   Mr. Arias now agrees that under the Guidelines he should  
5                   be held responsible for one to three kilograms of heroin  
6                   rather than one to 400 grams, which was the basis of  
7                   your objection, or the 3,146 grams found by the  
8                   Probation office. Is that indeed Hector B. Arias'  
9                   present position?

10                  MR. McCALL: It was yesterday, after about five  
11                  or six hours with an interpreter in the Marshal's  
12                  lockup, we left, and that was his position taken by  
13                  himself, his wife, and son.

14                  THE COURT: Mr. Arias, are you as you stand  
15                  here today in agreement, after speaking with your  
16                  attorney, that you should be held responsible for one to  
17                  three kilograms of drugs?

18                  THE DEFENDANT: Yes.

19                  THE COURT: And are you fully satisfied with  
20                  Mr. McCall's work as your lawyer in this case?

21                  THE DEFENDANT: Yes.

22                  THE COURT: Well, I'm going to accept that  
23                  resolution of this dispute. The Probation Department  
24                  recommended 3,146 grams, which I believe would expose  
25                  Mr. Arias to a higher sentence than the one to three

1 kilograms. Having studied the presentence report, I  
2 find that there was very substantial evidence to  
3 establish the one to three kilograms, and the only  
4 serious question I can perceive, if this matter were  
5 litigated, is whether he would be held responsible for a  
6 higher amount and, therefore, have to serve a higher  
7 sentence. So I certainly think there's a proper factual  
8 basis for this agreement. On the other hand, we're only  
9 talking about the difference of less than 150 grams.  
10 There are some debatable issues that exist, and I think  
11 that since, in situations like this, reasonable  
12 approximations are not only permissible but required,  
13 that the agreement the parties reached is reasonable  
14 and, therefore, I will accept it.

15 Accordingly, the base offense level is 32.

16 Then, there was an issue as to whether -- as  
17 Probation and the government agree -- there should be a  
18 four level enhancement for role in the offense. The  
19 evidence of that in the presentence report seemed  
20 overwhelming.

21 Mr. McCall, you tell me that Mr. Arias now  
22 agrees to accept that and withdraws his --

23 MR. McCALL: I think, as your Honor said, he  
24 realizes that the evidence is overwhelming, and I don't  
25 have much to say about it.

1                   THE COURT: But that is an objection you've  
2 withdrawn?

3                   MR. McCALL: Yes, your Honor.

4                   THE COURT: Hector B. Arias, please stand  
5 again.

6                   Do you agree that under the Sentencing  
7 Guidelines it is proper to give you a four level upward  
8 adjustment for your role as an organizer or leader of a  
9 group which consisted of more than five defendants?

10                  THE DEFENDANT: Yes, that's fine.

11                  THE COURT: And I will, as I said, or  
12 indicated, accept that, because there is overwhelming  
13 evidence to establish that.

14                  As I understand it, the government has  
15 withdrawn its objection with regard to obstruction,  
16 which also strikes me as -- although my role in  
17 assessing the government's judgments are different --  
18 but as reasonable in the circumstances.

19                  MR. PELGRO: Yes, your Honor. Related to  
20 family relationships, essentially.

21                  THE COURT: Including not acknowledging that  
22 Hector A. Arias, who is in the courtroom, or mentioning  
23 that he was his son.

24                  MR. PELGRO: Right.

25                  THE COURT: That one, the government would have

1 had some difficulty proving, and it is proper to get the  
2 three level reduction for acceptance of responsibility.

3 So, if I've done the arithmetic right, I think  
4 that leaves us at a level 33.

5 MR. McCALL: Yes, your Honor.

6 THE COURT: So with regard to this defendant,  
7 the total offense level is 33. The criminal history  
8 category is 1. To the best of my knowledge, nothing  
9 changes with regard to the other categories. 33-1, the  
10 Guidelines are 135 to 168 months. There's 36 months  
11 supervised release, a fine range of 25,000 to a million  
12 dollars, and a \$100 special assessment.

13 MR. PELGRO: Judge, on the issue of supervised  
14 release, the government, as you may or may not be aware,  
15 has sort of an ongoing issue about that with Probation.  
16 The government alleged over a kilo of heroin. The  
17 defendant is agreeing to over a kilo of heroin. If you  
18 look in 841B1A, it says the period of supervised release  
19 shall be not less than five years. The government feels  
20 that that's the period of supervised release that is  
21 applicable here. I believe, based on Apprendi,  
22 Probation takes a different tap on that. I think in  
23 this situation where the defendant is agreeing to that  
24 quantity and it's alleged in the indictment --

25 THE COURT: What is it that raises it to 60

1 months?

2 MR. PELGRO: B1A, your Honor. Title 21,  
3 section 841B1A says, if the quantity is 1,000 or more  
4 grams of heroin, the period of supervised release shall  
5 be not -- shall be at least five years.

6 THE COURT: Well, I guess I'll reserve judgment  
7 on that until I impose sentence.

8 Other than that, does the government agree that  
9 the Guideline ranges are as I've calculated them?

10 MR. PELGRO: Yes, your Honor.

11 THE COURT: Mr. McCall, do you agree?

12 MR. McCALL: I agree.

13 FROM THE FLOOR: I believe fine is 17,500 on a  
14 level three.

15 THE COURT: 17,500, okay, with that amendment.

16 Mr. Arias, you may be seated.

17 Let's go -- why don't I go defendant by  
18 defendant. I think -- actually, who's the next person  
19 you reached an agreement with?

20 MR. PELGRO: Partial agreement with Hector A.  
21 Arias.

22 THE COURT: All right.

23 MR. PELGRO: Your Honor, with regard to Hector  
24 A. Arias, my understanding is that the defendant is  
25 agreeing with the government's position concerning the

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA ) CR 01-10056  
 ) Boston, MA  
v. ) September 11, 2002  
 )  
NELSON RUDY TEJEDA, ET AL )

BEFORE THE HONORABLE MARK L. WOLF  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

(As previously noted.)

JUDITH A. TWOMEY, RPR  
Official Court Reporter  
One Courthouse Way  
Courtroom 10-Room 5200  
Boston, MA 02210  
(617)946-2577



INDEX

| <u>WITNESS</u> | <u>DIRECT</u> | <u>CROSS</u> | <u>RD</u> | <u>RC</u> | <u>COURT</u> |
|----------------|---------------|--------------|-----------|-----------|--------------|
|----------------|---------------|--------------|-----------|-----------|--------------|

|           |  |    |  |  |  |
|-----------|--|----|--|--|--|
| Jose Cruz |  | 58 |  |  |  |
|-----------|--|----|--|--|--|

| <u>EXHIBITS</u> | <u>MARKED</u> | <u>RECEIVED</u> |
|-----------------|---------------|-----------------|
|-----------------|---------------|-----------------|

|    |  |    |
|----|--|----|
| 13 |  | 30 |
| 14 |  | 33 |

1 going to do each defendant one by one. I'm going to  
2 start with Hector B. Arias, go to Hector A. Arias,  
3 Yolanda Herrera.

4 We'll take a break now for about ten minutes,  
5 and I will begin sentencing the defendants.

6 Court will be in recess.

7 (Short break.)

8 THE CLERK: Court is back in session. You may  
9 be seated.

10 THE COURT: You may be seated.

11 As we have discussed, we'll start with Hector  
12 B. Arias. He's already told me that he has read the  
13 presentence report. We've identified the issues that  
14 might make a difference to sentencing. I believe that  
15 except with regard to supervised release there are no  
16 open issues. The parties and the court have agreed that  
17 the amount attributable to the defendant is one to three  
18 kilograms. He was a leader and organizer of a  
19 conspiracy that involved more than five people. There  
20 is no obstruction of justice by him. There is at most  
21 or worst innocent errors. Acceptance of responsibility  
22 is appropriate.

23 I'm going to leave open for just a second the  
24 issue of supervised release. But, Mr. McCall, have I  
25 recited that all properly?

1                   MR. McCALL: Yes, your Honor. Just one thing I  
2 would mention to the court. Perhaps I overlooked it.  
3                   In the presentence report, on financial condition,  
4 ability to pay, it's my memory and I did check it with  
5 Pretrial Services. There was a lengthy interview, and  
6 they were taking Mr. Arias back to Plymouth. I believe  
7 our collective memory is that we did touch on what if  
8 any assets he had available and that there weren't any.

9                   THE COURT: Actually, we'll discuss that.  
10                  Maybe I will stop.

11                  Let's go to the addendum to the presentence  
12 report. It begins at page 124. The first objection  
13 generated -- by the government -- generated a  
14 correction.

15                  The second objection generated an amendment.

16                  The third objection went to weight. So that  
17 objection should be allowed and is allowed.

18                  The fourth objection relates to the weight and  
19 is allowed.

20                  The fifth objection is the same.

21                  The sixth objection generated an amendment.

22                  The seventh objection relates to the earlier  
23 objections concerning Guideline calculations.

24                  Objection 8 seems to require no ruling. Is  
25 that correct?

1 MR. PELGRO: That's correct, your Honor.

2 THE COURT: Do you agree, Mr. McCall?

3 MR. McCALL: I do, your Honor.

4 THE COURT: The defendant's objection, the  
5 first one, goes to obstruction of justice and, by  
6 agreement, that is allowed. The obstruction enhancement  
7 has been removed.

8 The second objection related to acceptance of  
9 responsibility, and that's allowed. He is getting  
10 credit or acceptance of responsibility.

11 The third objection related to weight, and it's  
12 allowed in part. I'm not holding him accountable for  
13 3,605 grams, but he is being held for one to three  
14 kilograms.

15 The fourth objection has been withdrawn. That  
16 was the objection to a four level increase as an  
17 organizer or leader. And even if it hadn't been  
18 withdrawn, the evidence is overwhelming that that four  
19 level upward adjustment is appropriate.

20 The fifth objection, again, relates to amount.

21 And I think that's all the objections. Is that  
22 correct?

23 MR. PELGRO: Yes, your Honor.

24 MR. McCALL: Yes, your Honor.

25 THE COURT: Therefore, I'm putting aside the

1 issue of supervised release. The total offense level,  
2 as I calculate -- but none of this is rhetorical --  
3 counsel and the Probation Department should correct me  
4 if you think there's an error -- total offense level is  
5 33. The criminal history category is 1. Guidelines are  
6 135 to 168 months in prison. Fine range of 17,500 to \$1  
7 million. And a \$100 special assessment.

8 Do the parties agree with that as far as it  
9 goes?

10 MR. PELGRO: Yes, your Honor.

11 MR. McCALL: Yes, your Honor.

12 THE COURT: I hear no (sic) from Probation. If  
13 you want, I'll give the parties an opportunity to be  
14 heard on this but I, at the moment, think the government  
15 is right and that 60 months supervised release is  
16 proscribed by the statute and not inapplicable because  
17 of the Supreme Court decision in Apprendi.

18 First of all, it's not clear that the five  
19 years raises or represents a raise in the maximum  
20 statutory penalty. There's cases, I think, like US  
21 versus Quiodel (sic), 229 F 3rd 926, that suggest that  
22 supervised release of up to ten years or more can be  
23 imposed under this drug statute. There's no expressed  
24 maximum and, therefore, five years would be within the  
25 statutory cap.

1                   More significantly, in this case, or to me, the  
2 defendant pled guilty and waived his right to have the  
3 jury decide the amount and, therefore, it would be  
4 permissible for the court, if necessary, to decide it,  
5 and to have the amount of supervised release flow from  
6 that decision.

7                   In addition, with regard to this defendant, at  
8 least, there has been no dispute regarding the amount.  
9 The parties agree that it's one to three kilograms. As  
10 things evolved, I've basically accepted that resolution  
11 as reasonable. So I haven't even decided the amount.  
12 If it had been litigated, it's possible I would have  
13 decided it was more than the three kilograms as  
14 Probation recommended, although for reasons I said the  
15 other day, approximations are required in matters like  
16 this, and this was a reasonable arm's length resolution  
17 of the issue.

18                   So, for all of those reasons, it's my present  
19 intention, except possibly hearing from Mr. McCall, to  
20 impose 60 months of supervised release. It may be  
21 academic, because when Mr. Arias gets out of prison,  
22 he's likely to be deported. But do you want to be heard  
23 on this issue?

24                   MR. McCALL: No, your Honor.

25                   THE COURT: So the Guideline range for Mr.

1 Arias and for others as to whom that analysis applies,  
2 in my view, is 60 months.

3 What then is the government's recommendation  
4 with regard to Hector B. Boogie Arias and what are the  
5 reasons for it?

6 MR. PELGRO: Your Honor, the government is  
7 recommending a period of incarceration of 168 months, to  
8 be followed by a term of supervised release of five  
9 years. The government is not advocating a fine in this  
10 case because the government doesn't feel the defendant  
11 has the ability to pay a fine, and the \$100 special  
12 assessment.

13 Your Honor, as you can tell from the voluminous  
14 presentence report and some of the evidence we've heard,  
15 the defendant and his son are the two persons most  
16 responsible for the distribution of up to three  
17 kilograms of heroin on the streets over that two plus  
18 year period of time that we can prove this conspiracy  
19 was in existence.

20 The defendant, as you know from the PSR,  
21 illegally entered the United States in 1991. He jumped  
22 bail on INS deportation proceedings. He relocated to  
23 Boston. Despite living with his common law wife with  
24 whom he's had a relationship for a number of years, he  
25 entered into this marriage, civil marriage ceremony,

1 which the government contends was a sham, and then he  
2 used that to try to persuade INS to change his status  
3 from illegal to legal.

4 He's used a false identity, Ramos Pogaro (sic),  
5 for medical benefits and different types of things.  
6 He's used a false Social Security number in order to  
7 work. But, more importantly, he's the person who sat in  
8 7 Daria Court and pulled the strings by which all of  
9 this conspiracy was obtained from multiple suppliers,  
10 processed and bagged and prepared for distribution by  
11 his son, by his common law wife, sometimes by his son's  
12 girlfriend, Linna Gonzalez, in that apartment, stored in  
13 the apartment, and then sent out through a whole network  
14 of couriers to various retail distributors on the  
15 street. That when the DEA began its investigation in  
16 January of 1999, that conspiracy was in full bloom.  
17 That was going. It was still going when the defendants  
18 were arrested on February 23, 2001, over two years  
19 later.

1 out, for the most part, and contacting the suppliers and  
2 organizing the acquisition of inventory. He delegated  
3 that responsibility to his son. He was not the person  
4 who was actually sitting there and putting the cut into  
5 the heroin and making the packets. He had delegated  
6 that responsibility to his family members.

7 As you can see from all of the presentence  
8 reports in this case, he exercised tight control and  
9 discipline over Ms. Herrera and, to a certain extent,  
10 over his son Arias, although they had disagreements  
11 along the way.

12 The defendant is the classic insulated leader  
13 who does not take the risk and go out on the street and  
14 make the deals but reaps the benefits. He reaped the  
15 profits from all this, and he's the person the  
16 Guidelines say has the most relative responsibility, and  
17 he should get the highest sentence in this case.

18 THE COURT: Thank you. Mr. McCall.

19 MR. McCALL: Thank you, your Honor.

20 Your Honor, my client is 50 years old, and he  
21 has no prior record. His offense conduct and the role  
22 in the offense are reflected in the Guidelines. He has  
23 accepted responsibility. It was his decision, your  
24 Honor, not to pursue what may well have been a less than  
25 compelling, if not frivolous argument on the lesser

1 amount. That was his decision. It's by way of saying,  
2 your Honor, since his arrest, he's done everything that  
3 he can do to own up and accept responsibility.

4 He's in very poor health. He suffered a heart  
5 attack in 1999. He was hospitalized for an extended  
6 period of time. He has high blood pressure. He's  
7 diabetic. I can state from personal knowledge that I  
8 have been down to Plymouth on several occasions that  
9 I've been down to see him. On several of those  
10 occasions, he's actually been in the infirmary being  
11 treated by physicians. It's been an extremely difficult  
12 pretrial detention for him.

13 The presentence report, your Honor, recounts a  
14 difficult childhood. I know your Honor has read it, so  
15 I'm not going to repeat it, what's in the biographical  
16 section.

17 THE COURT: Doesn't it also -- I'm sorry go  
18 ahead.

19 MR. McCALL: Just he had a difficult parenting  
20 situation where he was actually locked in the house at  
21 times due to a domestic disturbance between his wife  
22 (sic) and his father.

23 THE COURT: His mother and his father.

24 MR. McCALL: His mother and his father. When  
25 he came to this country, he was unable to speak or read

1 English.

2 THE COURT: Doesn't the presentence report --  
3 and, again, I want to try to make sure I don't confuse  
4 any of the defendants -- indicate that he was working in  
5 the Dominican Republic?

6 MR. McCALL: Yes, your Honor. Yes, he had jobs  
7 in the Dominican Republic. When he came to this  
8 country, he was unable to speak or read English, with no  
9 formal education, none, not even one grade, your Honor.  
10 Simply put, to that extent, he hasn't had the advantages  
11 that certainly everyone at these tables have had with  
12 parents that gave us the opportunity to go to school and  
13 learn.

14 I've been to 7 Daria Court with certain  
15 co-counsel here, and he was not living a high life, by  
16 any stretch of the imagination.

17 That being said, your Honor, it was his  
18 decision to engage in this business, truly, as a family  
19 affair, unfortunately.

20 What I'm asking the court to consider is that  
21 his role in the offense and the offense conduct -- the  
22 seriousness of the offense is reflected in the Guideline  
23 range of 135 to 168 months -- I'm asking the court to  
24 consider the fact that he has absolutely completely no  
25 prior record. His age, I think he's aged beyond his

1 years, your Honor. He has very poor health. He's been  
2 seen several times. He has a circulation problem in his  
3 right leg. That in addition to the fact that he faces  
4 certain deportation, he's not going to be a free man in  
5 this country even for a single day. He faces a  
6 significant sentence, no matter what, at which time he  
7 will be deported. I'm asking the court to consider that  
8 he's a candidate -- because of no record, his poor  
9 health, and certain deportation, that he's a candidate  
10 for the low end of the Guideline range.

11 THE COURT: I'm addressing Hector B. Arias.

12 Mr. Arias, you now have an opportunity but not  
13 an obligation to speak before I decide what sentence to  
14 impose. That means that you do not have to say anything  
15 if you don't want to, but if there's anything you would  
16 like to say, this is the time.

17 Perhaps the interpreter --

18 THE INTERPRETER: I think if the defendant  
19 keeps his voice up, I can do it from here.

20 THE DEFENDANT: I want to apologize to the  
21 government of the United States for the mistake that I  
22 have made and to the judge as well. And that's all.  
23 God bless you.

24 THE COURT: Mr. Arias, please stand.

25 In connection with the one count to which you

1 have pled guilty, I hereby sentence you to serve 168  
2 months in the custody of the Attorney General of the  
3 United States, to be followed by 60 months of supervised  
4 release on the standard conditions and on the additional  
5 conditions that you use your true name and other  
6 identifying information at all times, that you not  
7 possess a firearm or other dangerous weapon, that you  
8 participate in any substance abuse testing or treatment  
9 program proscribed by Probation and, if you're deported  
10 or ordered deported, you leave the United States  
11 immediately and not return without the authorization of  
12 the Attorney General.

13 In addition, you are to pay a \$100,000 fine as  
14 a condition of your supervised release, and there is  
15 also a \$100 special assessment.

16 In your plea agreement, you waived some but not  
17 all of the rights to appeal that you had or ordinarily  
18 have. As I read it, you have not given up your right to  
19 appeal the decisions relating to your sentence if  
20 they're otherwise appealable. But if you wish to pursue  
21 an appeal, one must be filed -- a notice of appeal must  
22 be filed within ten days of the entry of judgment. If  
23 you would like to appeal but cannot afford a lawyer, one  
24 will be appointed to represent you at public expense.

25 As far as I'm concerned, you are the living

1 embodiment of one of the most dismal failures of many  
2 the systems in the United States that I have ever  
3 directly encountered. You were in Barney (sic) in the  
4 Dominican Republic. As far as I can tell from the  
5 presentence report, you were able to work there. Now,  
6 lots of people want to come to the United States, and  
7 this country is extremely generous in admitting people  
8 legally and giving people an opportunity, but not  
9 everybody who wants to come here can be accepted. You  
10 came here illegally, you evaded deportation, you used  
11 false identity, you lived in subsidized housing, and you  
12 didn't come here to work hard honestly and send money  
13 back, you came here to deal drugs. As far as I can  
14 tell, that was your main occupation. And what you've  
15 done in the process is contribute to really injuring if  
16 not destroying many lives. And you can look at your son  
17 sitting next to you, who's going to go to prison for  
18 many years because of the directions you gave him. You  
19 can look at your wife sitting next to you, and she's  
20 going to go to prison for many years. You can look at  
21 the mother of your grandchild, Ms. Gonzalez, and you can  
22 think about all the generations of your own family that  
23 you've substantially injured if not destroyed. And then  
24 you can look further down at all these addicted people  
25 who's potential for any kind of happy life is threatened

1 because they can get heroin.

2                   That's what you contributed to. And I think it  
3 was Ms. Gonzalez who said something very interesting and  
4 important to all of these proceedings, and that is, when  
5 your son recruited her when she was pregnant to  
6 participate in this, he told her it was riskless. And I  
7 get the impression from this case, there must be a lot  
8 of people in or from Barney and the Dominican Republic  
9 who think coming to this country and dealing drugs is  
10 riskless, and I hope the next time you call or write  
11 home, you'll tell them it's not. Because part of the  
12 reason for this sentence is to recognize the seriousness  
13 of the offense you committed. Part of it is to send a  
14 message to you that if and when you get out of prison  
15 and get deported you don't come back here. But it's  
16 also intended to send a message to other people. This  
17 is not riskless. This is not the Boston Municipal  
18 Court. You deal heroin in this country, you may end up  
19 here, and you'll get a great lawyer appointed for  
20 nothing, and you'll get careful attention from the  
21 Probation Department and the judge, but, ultimately, the  
22 sentencing laws in the United States courts are severe,  
23 and they're severe because these crimes are serious.

24                   You're the person primarily responsible for  
25 everybody else being here, and that's why the Guidelines

1 say that 168 months is reasonable for somebody. And I  
2 can't imagine, you know, if it's reasonable for somebody  
3 why it wouldn't be reasonable for you.

4 The federal prisons have medical facilities  
5 and, if you have medical needs while you're in prison,  
6 they'll address them. But when you get out, you're  
7 going to be on supervised release. The reason I've  
8 imposed a hundred thousand dollars fine is I'm not  
9 satisfied -- I don't know where all this money went. I  
10 mean, I listened to Ms. Charles, and I'm not satisfied  
11 she has no money, although there may be immunity issues  
12 in pursuing that with her. But if the government finds  
13 the money, you'll have to pay the fine or, if you have  
14 any money, you'll have to pay the fine. But when you're  
15 deported, if you come back to the United States, you'll  
16 get caught again, and then you can be brought back in  
17 front of me, locked up for about five more years in this  
18 case, and then prosecuted for coming back again.

19 So you're going to have many years to think  
20 about what you're going to do when you get out of  
21 prison, and I hope you'll use that time in part to  
22 become determined not to come back to the United States  
23 and also in part to tell people back in the Dominican  
24 Republic that coming here illegally and dealing drugs is  
25 a big mistake.

1                   You may be seated.

2                   MR. McCALL: Your Honor, my client asked me to  
3                   request the court if there could be a recommendation  
4                   that he serve his sentence at Fort Dix. He has family  
5                   in that area.

6                   THE COURT: It's the practice of the Bureau of  
7                   Prisons to incarcerate a defendant at the facility  
8                   consistent with his security level that is nearest to  
9                   his family, and I ordinarily don't make any  
10                   recommendations. You should explain all that to the  
11                   Bureau of Prisons, but I'm not going to make the  
12                   recommendation in this case.

13                   With regard to Hector A. Arias, he too has read  
14                   the presentence report. We'll go through the  
15                   objections. But as agreed by the parties and the court,  
16                   as I understand it, the defendant is responsible for one  
17                   to three kilograms. There is no adjustment for  
18                   obstruction of justice. He does get acceptance of  
19                   responsibility. I believe the only disputed issue is  
20                   role in the offense. Is that correct?

21                   MR. PELGRO: That's correct, your Honor.

22                   MR. MURPHY: That's correct, your Honor.

23                   THE COURT: We'll go through the other  
24                   objections eventually -- why don't we go through those  
25                   now just to make sure I endorse the -- the first

7-10056  
Wolf, J.**MANDATE****United States Court of Appeals  
For the First Circuit**

No. 02-2296

UNITED STATES,

Appellee,

v.

HECTOR BIENVENIDO-ARIAS,

Defendant, Appellant.

Before

Boudin, Chief Judge,  
Lipez and Howard, Circuit Judges.

## JUDGMENT

Entered: May 27, 2004

There was a very clear waiver of any claim of error in regard to the imposition of a four level sentencing enhancement in light of appellant's leadership role in the conspiracy to which he pled guilty. See U.S.S.G. § 3B1.1(a).

The government's motion for summary affirmance is granted.  
1st Cir. R. 27(c).

Certified and Issued as Mandate  
under Fed. R. App. P. 41.

By the Court:

Richard Cushing Donovan, Clerk

Richard Cushing Donovan, Clerk.

Deputy Clerk

By: JULIE GREGG  
Appeals Attorney.

Date: 4/17/04

[cc: Douglas Beaton, Esq., Michael Pelgro, AUSA, Peter Levitt,  
AUSA, Dina Chaitowitz, AUSA, Virginia Vander Jagt, AUSA]

